UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEVEN JONES,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 91-0030-P***
	)	
JAMES CLEMONS, WARDEN,	)	
WINDHAM CORRECTIONAL CENTER,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

Steven Jones, imprisoned at Windham Correctional Center in Maine for aggravated assault and assault on a minor, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. ' 2254. Jones raises three grounds for collateral attack: (1) improper prosecutorial comment violating his Fourteenth Amendment right to due process and Sixth Amendment right to confront witnesses against him; (2) limitations on cross-examination affronting his Fourteenth Amendment right to due process and Sixth Amendment right to confront witnesses against him; and (3) conviction based upon insufficient evidence, in violation of his Fourteenth Amendment right to due process. For the reasons articulated below, I recommend that Jones' petition for habeas corpus be denied.

I. BACKGROUND

On June 10, 1988 a Cumberland County grand jury returned a two-count indictment against Steven Jones charging him with aggravated assault and assault on a minor. *See* Indictment, Clerk's Record, State of [sic] Steven Jones (``Clerk's Record"). Both counts stemmed from Jones' alleged

assault on his two-month-old son, Shae, on or about February 2, 1988. *See id.* Jones baby-sat Shae from about 10 a.m. to 2:30 p.m. on February 1, 1988 at the request of Shae's mother Michele Hawes. *See* Trial Transcript at 448-49, 452, *State v. Jones*, No. CR-88-817 (Me. Super. Ct., Cum. Cty., Sept. 29, 1989) (``Trial Transcript") (testimony of Jones). Jones and Hawes had been living together when Shae was born on December 5, 1987 but had separated in January 1988. *See id.* at 437-38, 441 (testimony of Jones). Jones, by all accounts a loving father, had seen Shae only once between January 20 and February 1, 1988. See *id.* at 446-47 (testimony of Jones). Shae was admitted to the Maine Medical Center in Portland on February 2, 1988, suffering from a facial bruise, a thigh bruise, nausea, convulsions, hemorrhages of the retina and bleeding in his brain. *See id.* at 278, 280-81, 288-89, 332 (testimony of treating physicians). His treating physicians diagnosed his condition as ``shaking baby syndrome," inflicted by violent shaking possibly accompanied by a blow to the head.[1] *See, e.g., id.* at 290 (testimony of Dr. Lynch), 377 (testimony of Dr. Rioux). Medical evidence was inconclusive as to whether Shae was injured before or after 10 a.m. on February 1, 1988. After a three-day trial by jury presided over by Superior Court Justice Stephen L. Perkins, Jones was convicted March 30, 1989 on both counts. *See* Docket Sheet, Clerk's Record. Jones thereupon moved for acquittal or for a new trial; Justice Perkins denied the motion for acquittal but granted the motion for a new trial. *See id.* Jones was again tried by jury from September 27-29, 1989, Superior Court Justice William E. McKinley presiding. *See id.* The second jury convicted Jones on both counts. *See id.* Jones' motion for acquittal or, in the alternative, for a new trial was denied. *See id.* On January 26, 1990 Justice McKinley sentenced Jones to four years on each count, to run concurrently with all but two years suspended. *See id.* Jones' sentence was stayed pending appeal to the Maine Supreme Judicial Court

[1] Shae appears to have recovered from shaking-baby syndrome; however, a treating physician testified that it is too soon to know whether Shae suffered permanent injuries. *See* Trial Transcript at

(``Law Court"), which on September 27, 1990 affirmed the judgment of the Superior Court. *See id.* On October 9, 1990 Jones began serving his sentence. *See id.* He filed the instant petition for habeas corpus on January 30, 1991.[2] *See* Petition Under 28 USC ' 2254 for Writ of Habeas Corpus by a Person in State Custody.

II. LEGAL ANALYSIS

As an initial matter, a court deciding a habeas-corpus petition must consider whether an evidentiary hearing is necessary. Jones seeks no such hearing; however, pursuant to Rule 8(a), Rules Governing ' 2254 Cases, I have independently reviewed the record and find that such a hearing is unnecessary. This case moreover presents none of the circumstances determined by the Supreme Court to mandate such a hearing. *Townsend v. Sain*, 372 U.S. 293, 312-18 (1963). I therefore proceed under Rule 8(a) to ``make such disposition of the petition as justice shall require."

A. Improper Prosecutorial Comment

Jones first urges this court to overturn his conviction on the ground that prosecutor Megan Elam in her closing argument committed error of constitutional dimension. Elam commented:

> I suggest when you evaluate the credibility of these witnesses and their testimony you also consider something very important: the only witness who testified in this case who had heard everybody else's testimony before he gave you his version was the defendant. Mr. Jones had the

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386 (testimony of Dr. Rioux).

[2] Jones was represented by counsel at every stage of the proceedings against him and is represented by counsel in the instant habeas corpus petition.

> benefit of knowing what everybody else said before he testified. What opportunity did that give Mr. Jones to testify as he did?

Trial Transcript at 590. Jones' attorney immediately objected, whereupon Justice McKinley commented:

> I would agree. I think the argument is inappropriate as to the fact that the witness -- that the last witness that testified was the defendant, and I'll exclude that reference and ask the jurors to disregard it. . . . I might say, it is the first time I have ever been treated to that argument and I do not frankly think it is proper.

Id. at 590-91. On appeal, the Law Court noted that the prosecutor's comment was indeed improper; however, it declined to rule on the merits on the ground that Jones had failed to preserve the error by either objecting to the curative instruction or moving for a mistrial. *State v. Jones*, 580 A.2d 161, 162-63 (Me. 1990).

Jones initially contends that he was improperly held to have procedurally defaulted. He asserts that neither the Maine Rules of Criminal Procedure nor Evidence inform trial counsel that an initial objection is insufficient to preserve an error of this magnitude. Petitioner's Memorandum in Support of Habeas Corpus Petition (``Petitioner's Memorandum") at 23. As Jones observes, Maine's rules do not explicitly address preservation of error when counsel objects and a curative instruction is given. Nonetheless, the Law Court has made clear that to preserve error in such a situation counsel must either object to the curative instruction or move for a mistrial. *See, e.g.*, *State v. Gordius*, 544 A.2d

309, 311 (Me. 1988); *State v. Pomerleau*, 363 A.2d 692, 698 (Me. 1976). Jones objected in motions for judgment of acquittal or for a new trial -- too late to preserve the objection properly.[3]

Jones next challenges the adequacy of the state procedural bar. A procedural default can constitute ``adequate and independent grounds" to bar federal habeas-corpus review provided the state court plainly articulates default as the basis for its decision. *Harris v. Reed*, 489 U.S. 255, 262-63 (1989). The Law Court here did so. Plain statement notwithstanding, a procedural default still may be challenged as lacking the requisite adequacy or independence. *See, e.g., id.* at 262; *Prihoda v. McCaughtry*, 910 F.2d 1379, 1382-83 (7th Cir. 1990). Jones vigorously attacks the adequacy of the procedural default in his case. First, he contends that Maine lacks a contemporaneous-objection policy. Petitioner's Memorandum at 11-12. Contemporaneous-objection policies form well-recognized bases for ``adequacy" of state procedural default. *See, e.g., Casale v. Fair*, 833 F.2d 386, 390 (1st Cir. 1987); *Breest v. Perrin*, 655 F.2d 1, 2-3 (1st Cir.), *cert. denied*, 454 U.S. 1059 (1981). Jones mischaracterizes Maine law. Maine requires counsel to voice objections contemporaneously or risk default unless a party has no opportunity to object in a timely fashion. *See, e.g.*, M.R. Crim. P. 51; *Dadiego v. Clemmons*, 649 F. Supp. 1426, 1428-29 (D. Me. 1986); *State v. Dube*, 522 A.2d 904, 908-09 (Me. 1987).

[3] Jones notes that the state ``apparently concede[s]" the absence of a procedural bar. Petitioner's Reply Memorandum in Support of Petition for Writ of Habeas Corpus at 1. The state's unhelpful memorandum, *see* Response to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. ' 2254 Executed on December 21, 1990 (``State's Memorandum") at 6-8, is not of course binding on the court.

Jones attempts to minimize the significance of Maine's contemporaneous-objection rule by arguing that its enforcement is so erratic that, as a practical matter, we should consider Maine to have waived it. Petitioner's Memorandum at 22-24. Jones contends that the Law Court arbitrarily wields its power to review for ``obvious error," *see* M.R. Crim. P. 52(b), reaching the merits of defaulted errors much less egregious than that committed by Elam. Petitioner's Memorandum at 12-13. Hence, he argues, Maine ``lacks a definite policy of review of errors." *Id.* at 13. The fact that states empower their courts to review for obvious error despite procedural default is neither inconsistent with nor corrosive of contemporaneous-objection policies. *See, e.g.*, *Prihoda*, 910 F.2d at 1384 (``Both the Supreme Court and the inferior courts respect state procedural grounds unless they are regularly *dis* regarded (or seemingly have been manufactured for the occasion . . .). A state ground that is solidly established will be respected even though not `strictly' followed.") (emphasis in original). Maine's policy is clear: one fails to object contemporaneously at one's peril, even as to errors of constitutional magnitude. The Law Court may review for obvious error in its discretion; no litigant is entitled to such review.[4] *See* M.R. Crim. P. 52(b); 2 D. Cluchey & M. Seitzinger, *Maine Criminal Practice* ' 52.4 (1990). The fact that the Law Court exercised its discretion not to review Jones' claim does not undercut the adequacy of the underlying ground for default. *See, e.g.*, *Breest*, 655 F.2d at 3 (``no unfair surprise or disappointment of justified expectations when the state adhered to its normal policy . . . .") (citation omitted).

[4] Even assuming *arguendo* that I were to find that the Law Court's failure to review this claim for obvious error undermined the adequacy of this procedural bar, thus allowing me to reach the merits, the recommended outcome would be the same. Given the curative instruction by the trial judge, the overall fairness of this trial and the vigor of defense counsel's cross-examinations, I would find this error ``harmless beyond a reasonable doubt." *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Jones finally argues that this court should overlook his default in that he demonstrates both cause for and resultant prejudice from it. Jones' demonstration of cause is transparently insufficient. He essentially argues that counsel made an inadvertent mistake. Petitioner's Memorandum at 25. Such error does not constitute cause for procedural default. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 488 (1986). Having determined that Jones fails to show cause, I need not consider whether he demonstrates prejudice. *See, e.g., id.* at 485; *Casale*, 833 F.2d at 390 (petitioner for habeas corpus must demonstrate both cause and prejudice to overcome procedural bar).

B. Limitation on Cross-Examination

Jones next contends that the trial judge erred in limiting the scope of cross-examination of two key prosecution witnesses, his ex-girlfriend Michele Hawes and her mother Sandra Strout. *See* Petitioner's Memorandum at 27-29. The state as an initial matter questions whether Jones exhausted this ground by properly raising it before the Law Court. *See* State's Memorandum at 8-9.

A habeas-corpus petitioner must exhaust his federal claim in state court before seeking federal-court review. *See, e.g., Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989). A petitioner exhausts a federal claim by presenting its substance in state court. *Id.* at 1096-97. ``Customary indicia" include federal constitutional language, citations and precedent. *Id.* at 1098. Jones adequately flagged the federal constitutional nature of his claim in presenting it to the Law Court. He prominently cited *Chambers v. Mississippi*, 410 U.S. 284 (1973) (holding that denial or significant limitation of cross-examination can offend due-process clause of Fourteenth Amendment). *See* Brief of Defendant/Appellant Steven Jones at 30, 35, *State v. Jones*, 580 A.2d 161 (Me. 1990). Therefore, although the Law Court chose to address only the state-law aspects of Jones' challenge, its federal-law indicia were fairly presented.

Jones contends that the trial judge violated his Sixth Amendment right to confront witnesses against him by limiting the extent to which he could cross-examine Hawes on their stormy relationship. Petitioner's Memorandum at 28-29. Jones claims he was robbed of the opportunity to demonstrate Hawes' motive and bias -- an especially glaring error in light of the circumstantial nature of the state's case and the importance of witnesses' credibility. *Id.* at 29. Jones also complains of lack of opportunity to show bias on Strout's part by eliciting testimony from a social worker, Phyllis Diorio, as to Strout's strange demeanor during investigation into Shae's injuries. *Id.*

The right to cross-examine witnesses in a criminal trial is essential to due process and inherent in the Sixth Amendment right to confront witnesses. *See, e.g., Chambers*, 410 U.S. at 294-95 (1973). ``[I]ts denial or significant diminution calls into question the ultimate ```integrity of the fact-finding process'" . . . ." *Id.* at 295 (citation omitted). Nonetheless, the Sixth Amendment ``guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Van Arsdall*, 475 U.S. at 679 (citation omitted) (emphasis in original). ``[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* The trial courts in both *Chambers* and *Van Arsdall* entirely blocked the sought-after cross examination. In Jones' case, by contrast, the trial judge allowed testimony from Hawes and Jones as to their stormy relationship but limited it to the period from December 1987 to January 1988. *See* Trial Transcript at 157-64 (cross-examination of Hawes), 438-39 (direct examination of Jones). Jones' counsel made two offers of proof that details of the relationship from

January 1987 on would reveal Hawes' motive to injure Shae[5] -- essentially that she had been obsessed with and spurned by Jones and struck out at Shae in revenge. *See id.* at 155-56, 184.

The record reveals that the testimony Jones' counsel was allowed to elicit from both Hawes and Jones as to their stormy relationship provided the jury with the substance of the testimony Jones sought to introduce. Jones' counsel suggested to the jury in his opening statement that either Jones, Hawes or Hawes' parents must have injured Shae. *See id.* at 39-40. The jury was informed that Hawes suffered from postpartum depression and harbored doubts about her abilities as a mother, *see id.* at 159-62 (testimony of Hawes), 438-41 (testimony of Jones); that Hawes thought Jones was a wonderful father, *see id.* at 157-58 (testimony of Hawes); that the relationship had become rocky in January 1988, *see id.* at 161, 163-64 (testimony of Hawes), 438 (testimony of Jones); and that Hawes still was in love with Jones as of January 1988, *see id.* at 163 (testimony of Hawes). The outlines of Jones' alternative-suspect defense were drawn clearly for the jury, and Hawes was effectively and vigorously cross-examined. I find that the trial judge did not commit constitutional error; I therefore need not consider whether error was harmless beyond a reasonable doubt. *See, e.g., Van Arsdall*, 475 U.S. at 680 (Confrontation Clause violated when defense counsel prohibited from demonstrating witness bias and exposing jurors to facts from which they can draw inferences as to witness reliability).

For similar reasons, the trial judge did not commit error of constitutional dimension in preventing the testimony of social worker Diorio as to Strout's strange demeanor during an interview with Diorio. Strout's testimony was critical to the prosecution's case in that she testified that Shae was

[5] The prosecution suggested as Jones' motive that he had to clean two messy bowel movements shortly after Shae's arrival and that he was disappointed that Shae was too sleepy to play. *See, e.g.*, Trial Transcript at 580-82 (closing argument by prosecutor Elam).

alert and behaving normally on the morning of February 1, 1988, before Hawes took him to Jones' apartment. *See* Trial Transcript at 62-63 (testimony of Strout). Jones' counsel apparently sought to introduce evidence of her odd demeanor to highlight her status as an alternative suspect. *See id.* at 262 (proffer of evidence). While it is unclear from the record exactly what kind of demeanor Strout allegedly displayed to Diorio and therefore how it would have impeached her credibility, it is clear that Jones was afforded constitutionally adequate opportunity to cross-examine Strout herself. *See, e.g., id.* at 88-92 (aggressive cross-examination of Strout eliciting inconsistencies in her testimony).

C. Insufficiency of the Evidence

Jones finally argues that the evidence elicited at trial was insufficient to convict him of the offenses for which he was indicted, depriving him of his Fourteenth Amendment right to due process. Petitioner's Memorandum at 29-31. The test of whether a defendant was convicted on the basis of insufficient evidence is not whether the reviewing court believes the evidence establishes guilt beyond a reasonable doubt but ``whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19, *reh'g denied*, 444 U.S. 890 (1979) (citation omitted) (emphasis in original).

To find Jones guilty of both counts as charged, the jury had to find beyond a reasonable doubt that (1) Jones was at least 18 years old at the time of the incident; (2) Shae was under 6; and (3) Jones recklessly caused serious bodily injury to Shae. *See* Indictment, Clerk's Record; 17-A M.R.S.A. '' 207, 208. Jones disputes neither the relevant age findings nor the findings as to Shae's injuries; he asserts that the jury could not rationally have attributed those injuries to him.

Jones suggests that the prosecution's ``whole case" hung on the presence of a bruise on Shae's face established to have occurred before Jones saw Shae on February 1, 1988. Petitioner's Memorandum at 30. As I read the trial transcript, the case did not hinge on the presence of the bruise. The jury heard conflicting evidence as to whether a blow necessarily accompanies the traumatic shaking in baby-shaking syndrome, *compare, e.g.*, Trial Transcript at 290, 293 (testimony of Dr. Lynch) *with id.* at 331 (testimony of Dr. Talbot), whether Shae's facial bruise evidenced such a blow, *compare id.* at 308 (testimony of Dr. Lynch) *with id.* at 384-85 (testimony of Dr. Rioux), 344-45 (testimony of Dr. Talbot), and whether, judging from the coloration of the bruise, it could have been inflicted during Shae's stay with Jones, *compare, e.g., id.* at 308 (testimony of Dr. Lynch) *with id.* at 361-64 (testimony of Dr. Talbot). The jury was entitled to resolve this conflicting evidence and draw inferences therefrom as to whether Jones injured Shae. A rational trier of fact could have concluded either that the bruise had nothing to do with the shaking or that the bruise was inflicted at the time of the shaking, while Shae was in Jones' care.[6] Other medical evidence was consistent with injury either before or after Jones baby-sat Shae. *See, e.g., id.* at 335 (testimony of Dr. Talbot that spinal tap indicated injury occurred within 24 hours of tap). The jury was entitled to credit the testimony of Hawes and Strout and discredit the testimony of Jones. In so doing, a rational jury could have found Jones guilty as charged beyond a reasonable doubt.

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[6] Based on the cold record before me -- without the benefit of observation of witness demeanor -- I cannot say that I personally would have drawn these conclusions. However, as explained above, the test of sufficiency of the evidence is not whether the court would have weighed conflicting evidence differently but rather whether any rational trier of fact could have arrived at its ultimate conclusion based on resolution of evidence and permissible inferences drawn therefrom.

III. CONCLUSION

For the foregoing reasons, I recommend that the instant petition for habeas corpus be ***DENIED***.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 12th day of June, 1991.

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David M. Cohen
United States Magistrate Judge